



Comptroller General  
of the United States

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Washington, D.C. 20549

## Decision

**Matter of:** Gordon R. A. Fishman

**File:** B-257634

**Date:** October 11, 1994

Thomas W. Rochford for the protester.

Barry D. Segal, Esq., General Services Administration, for the agency.

Scott H. Riback, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest allegation challenging various terms of solicitation for offers is dismissed as untimely where the protest was not filed in the General Accounting Office until 6 months after the deadline for submission of initial offers.
2. Protest allegations are dismissed as academic where agency intends to take corrective action that responds entirely to protester's concerns.
3. Protest that agency improperly requested information of protester that is not being requested of all offerors is dismissed for failure to state a valid basis of protest; request relates to protester's responsibility, and the particular information requested is unique to the protester's proposal and its offered building.

### DECISION

Gordon R. A. Fishman protests the terms of solicitation for offers (SFO) No. GS-05B-15777, issued by the General Services Administration (GSA) to obtain rental space for the Internal Revenue Service in Mount Clemens, Michigan. Fishman contends that various terms of the SFO are improper, and that GSA has improperly requested certain information of it during discussions.

We dismiss the protest.

The SFO requested fixed-price offers for the lease of up to 10,250 net-usable square feet of contiguous space in Mount Clemens, Michigan. By the terms of amendment No. 1, offerors were required to submit initial proposals by

December 17, 1993. Fishman timely submitted an initial offer by the closing date which included a document entitled "Items Requiring Clarification." This document contained a list of numerous items which the protester did not feel were adequately addressed by the terms of the SFO.

By letter dated June 1, 1994, the agency initiated discussions with Fishman. The agency's letter addressed some of Fishman's items for clarification, and requested information from the firm regarding various matters which GSA determined were inadequately addressed by its proposal. Based on the contents of this letter, Fishman filed a protest in our Office alleging that certain terms of the SFO were improper, and that certain of the agency's requests for additional information were improper.

Fishman contends that four aspects of the SFO are improper. First, Fishman contends that the SFO improperly fails to provide a preference for buildings located in the central business area of Mount Clemens. Second, Fishman maintains that the SFO improperly fails to state a basis for contract award; Fishman alleges that the SFO is required to have one of two clauses from the agency's SFO workbook that describe the basis for evaluation and award.<sup>1</sup> Third, Fishman argues that the SFO improperly fails to provide an estimate of the cost of moving, and does not otherwise permit the agency to consider moving costs in its evaluation of price proposals. Finally, Fishman alleges that the agency improperly changed the space requirement from approximately 8,500-8,600 square feet to 10,250 square feet of contiguous space by the terms of amendment No. 1, and impermissibly added various handicapped accessibility requirements.

We dismiss these allegations as untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1994), protests concerning alleged solicitation improprieties that are apparent on the face of a solicitation must be filed prior to the deadline for submitting initial proposals. All of Fishman's concerns were apparent from a reading of the SFO.<sup>2</sup> In fact, Fishman's "Items Requiring Clarification"

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<sup>1</sup>Although we dismiss this allegation as untimely, we note that the agency in its report states that it will include one of the two award basis clauses in a subsequent amendment. Consequently, this allegation appears to be academic in any case.

<sup>2</sup>Fishman's last two arguments were made for the first time in Fishman's comments on the agency report, although both changes were incorporated into the SFO prior to the deadline for submitting initial offers. Fishman contends in its  
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document, which was included as part of the firm's initial offer, reflects the firm's clear understanding of most of its concerns.<sup>1</sup> Consequently, Fishman's protest, which was filed approximately 6 months after the deadline for initial offers, is untimely.

Fishman contends that its protest on these grounds is timely even though it was filed after the December 17 deadline for submitting initial offers, since the SFO permits submission of initial offers any time prior to the deadline for submitting best and final offers (BAFO). Fishman contends that, since an initial offer can be timely submitted up to the deadline for BAFOs, so too can a protest challenging the terms of the solicitation.

This argument is without merit. The purpose of our timeliness requirements is to ensure that either our Office or the contracting agency is afforded an opportunity to consider protest allegations while corrective action, if warranted, is most practicable and least burdensome on the conduct of the acquisition. See, e.g., Cleveland Telecommunications Corp., B-247964.3, July 23, 1992, 92-2 CPD ¶ 47. In cases where the protest concerns alleged solicitation improprieties, the purpose of our timeliness rules is to afford parties a fair opportunity to raise objections to the terms of the solicitation prior to the submission of offers, so that if the protest is valid the matter can be remedied before offerors have relied on the terms of the solicitation in formulating their proposals. Ellman Cos., B-251288.2, Oct. 21, 1993, 93-2 CPD ¶ 241.<sup>4</sup>

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<sup>2</sup>(...continued)

comments that it was unaware of these bases of protest until after its receipt of the agency report and a review of certain correspondence between GSA and the tenant agency, the Internal Revenue Service. However, while those documents may reflect the rationale for the changes, the changes themselves were nonetheless apparent on the face of the SFO.

<sup>1</sup>To the extent that Fishman's "Items Requiring Clarification" document can be construed as an agency-level protest, it was also untimely because it was submitted as part of the firm's offer. Protests submitted with an offer are not timely because the agency has no obligation to examine proposals until after the deadline for submitting offers. Tomasz/Shidler Inv. Corp., B-250855; B-250855.2, Feb. 23, 1993, 93-1 CPD ¶ 170.

<sup>4</sup>In Ellman Cos., supra, the protester did not receive a copy of the SFO until after the deadline for submitting initial

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Consequently, even though the SFO permits the submission of a timely initial proposal as late as the deadline for BAFOs, it would nonetheless be inconsistent with the purpose of our timeliness rules to permit a protest concerning the terms of the SFO after the submission of initial offers. See generally id. We therefore decline to consider the merits of Fishman's protest as it relates to these allegations.

Fishman next argues that the agency has improperly limited the time after award for the successful contractor to perform renovations to its building. According to Fishman, the SFO as originally issued contained an occupancy date which would have allowed for a reasonable schedule for performing post-award alterations--by Fishman's calculations, it would have had 153 days to perform these alterations after award. GSA changed the delivery requirement to 75 calendar days after award, however, and Fishman maintains that this is not enough time. After this protest was filed, GSA prepared amendment No. 2 to the SFO, which provides a 180-day period after contract award and delivery of the agency's building plans for completion of any necessary alterations. Since this amount of time is more than the 153 days Fishman originally considered adequate, the amendment renders the protester's concern academic. See Steel Circle Bldg. Co., B-233055; B-233056, Feb. 10, 1989, 89-1 CPL ¶ 139.

Fishman, the incumbeant, also contends that GSA is currently restricting its renovation construction to evenings and weekends, which limits its ability to timely conform its building to various SFO requirements. This allegation concerns the administration of Fishman's current lease, and as such is a matter of contract administration, beyond our bid protest jurisdiction. 4 C.F.R. § 21.3(m)(1).

Fishman also argues that the agency improperly has required Fishman, and no other offeror, to perform testing to confirm its certification that its building has acceptable levels of radon and asbestos, and good air quality generally. However, while the agency did request such testing of Fishman during discussions, it now has eliminated these concerns. First, proposed amendment No. 2 eliminates the requirement that all offerors certify in their proposals

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offers. The protester submitted a timely initial offer by the deadline for BAFOs, and thereafter filed a protest against the terms of the SFO. We dismissed the protest as untimely because to do otherwise would have been inconsistent with our requirements. As in that case, we think Fishman was required, at a minimum, to file its protest prior to submitting its initial offer.

that their buildings have acceptable radon levels (only the successful offeror will be required to provide this certification); as a result, Fishman no longer will be required to provide this certification, or supporting test results. GSA also has advised our Office (in a September 30 letter) that:

"GSA will not require protester to complete any specific testing of its building with regard to asbestos or indoor air quality as a prerequisite to consideration for award under this SFC."

Further, GSA states that its request during discussions that Fishman perform testing should be disregarded. This aspect of the protest therefore also has been rendered academic.

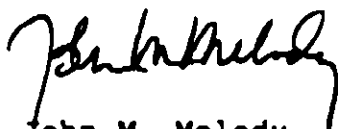
Finally, Fishman contends that the agency has improperly required it to submit information relating to its ability to obtain a financial commitment to perform various renovations in its building, as well as a detailed breakdown of its construction costs. Fishman maintains that, since no other offeror is being required to provide this information, it is improper for GSA to require it from Fishman.

The record shows that the contracting officer requested this information from Fishman after review of the firm's initial offer; he was concerned about Fishman's capability to perform because the firm had significantly reduced its rental rate from the rate charged under the predecessor lease, and the firm would be required to perform extensive renovations in order for it to meet various SFO requirements. The agency also explains that all offerors have been required to furnish similar information relating to financial commitments.

We see nothing improper in this information request. Federal Acquisition Regulation (FAR) § 9.104-1 provides that, in order to be determined responsible, a prospective contractor must have, among other things, adequate financial resources or an ability to obtain them, as well as the necessary facilities to perform the contract in accordance with the requirements of the solicitation. There is nothing improper in an agency gathering information relating to a firm's responsibility during its conduct of the acquisition. (In fact, FAR § 9.105-1 expressly provides for the contracting officer to seek information relating to responsibility even before issuing a solicitation in appropriate circumstances.) There also is nothing improper in GSA's request for information from Fishman that is not also being requested

from other offerors, since the particular information required to determine Fishman's responsibility is unique to its proposal and the conditions existing in its building.<sup>3</sup>

The protest is dismissed.



John M. Melody  
Assistant General Counsel

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<sup>3</sup>Fishman contends that GSA should refer its concerns relating to Fishman's responsibility to the Small Business Administration (SBA) under that agency's Certificate of Competency program since Fishman is a small business. To do so would be premature, however, since GSA has not yet determined Fishman nonresponsible, a condition precedent to referral of the matter to the SBA. FAR § 19.602-1.